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I.

COUNTER-STATEMENT OF QUESTIONS INVOLVED.

Where a Delaware corporation, lower riparian owner of land containing a pier and docks, brings a joint action, equitable in nature, praying for an injunction and proportionate assessment of damages, against sixteen Pennsylvania corporations, upper riparian owners of mining lands and collieries, alleging continuing trespasses arising from the negligent, reckless, wilful and wanton discharge of coal dirt, silt and other refuse materials into the river and its tributaries, which are then carried to and upon plaintiff's land, causing great damage to plaintiff's property, curtailing its lawful uses, greatly disrupting plaintiff's business, and threatening permanent injury and damage to plaintiff, and further alleging that the amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars, is there, under all the facts and reasonable inferences, a sufficient showing of federal jurisdiction?

(The Circuit Court of Appeals answered in the affirmative, and reinstated the bill of complaint.)

II.

COUNTER-STATEMENT OF THE CASE.

Petitioner's statement of the matter involved does not enumerate all the facts pleaded in the bill of complaint, nor conform to the exact sequence thereof. Respondent believes that such incompleteness requires some counter-statement of the facts.

The bill of complaint, together with its prayer for equitable relief, appears fully in the Record at pages 3a to 7a, inclusive. Paragraph 5 avers that building materials normally could be brought by boat to plaintiff's property, but culm deposits in the bed of the Schuylkill River, adjacent to plaintiff's property, prevent this. It is charged in paragraph 7 that defendants use large quantities of water to clean coal and then negligently and unlawfully discharge such water, heavily polluted with coal wastes, into the Schuylkill River or its tributary streams. It is further alleged that defendants deposit in the river or its tributaries, and upon the banks thereof, large quantities of coal dirt and other refuse from their mines, collieries, washeries and plants (par. 8); and have accumulated large culm and refuse piles which they have negligently, recklessly, wilfully and wantonly failed to secure against erosion and consequent pollution of the Schuylkill River and its tributary streams (par. 9).

It is charged in paragraph 10 that the culm and mining wastes so discharged into, and so allowed to enter the Schuylkill River and its tributaries, are carried to and upon the premises of the plaintiff, and are destroying the value of the river for navigation and the value of the plaintiff's property for the receipt and discharge of building materials by boats or barges. It is averred in paragraph 12 that the discharge of such materials has so raised the bed of the river that whenever there is any appreciable increase in the quantity of water in the river it overflows its banks at

and along plaintiff's property and results in great damage to the plaintiff's property and greatly disrupts plaintiff's business. Paragraph 13 avers that the acts in question are in violation of certain federal statutes, and paragraph 14 alleges that they constitute a nuisance.

In paragraphs 15 and 16 of the bill the plaintiff avers that defendants' actions in these respects are a continuing trespass which constantly increases the deposits in the river and threatens to make permanent the injury and damage to plaintiff; and that, by reason of such improper acts of the defendants, plaintiff has suffered large and irreparable damages through the permanent depreciation of the value of its property and through the curtailment of the lawful uses to which the property might be put by plaintiff.

The bill asks for equitable relief and, more particularly, for a permanent injunction against the discharge of waste material into the Schuylkill River, or its tributary streams; that the defendants be required to take adequate measures and precautions to prevent the escape of such waste materials; that the damages sustained by plaintiff be ascertained and assessed against each defendant in proportion to its contribution to the injury; that defendants pay to the plaintiff all costs necessary to restore the channel of the Schuylkill River adjacent to plaintiff's property; that defendants pay to the plaintiff the costs of the action, and that there be such other and further relief as the court may deem proper.

In some respects petitioner's statement of the case tends to be argumentative. For instance, it advances the conclusion that the bill of complaint has aggregated claims against the several defendants for the purpose of showing the jurisdictional amounts (p. 3). Also, a certain amount of argument, appears in petitioners' treatment of the motion to dismiss the complaint. Since these matters will be met in respondent's argument, they need not be elaborated upon at this point.

The exact grounds of defendants' motion to dismiss appear in the Record, at pages 8a to 10a, inclusive. They are also considered in respondent's argument and need not be repeated here.

Respondent believes that the decision of the Circuit Court of Appeals (20 to 30) fully passes upon all the contentions raised by defendants.

III.

ARGUMENT FOR THE RESPONDENT.

Introductory Statement.

Respondent's reply to the Petition for Writ of Certiorari and to Petitioners' Brief resolves itself into four categories, following the sequence of the matters to which petitioners state their argument would be directed. Consequently, respondent's argument covers the following matters:

(1) The protection of property rights is the matter in controversy.

(2) Defendants were properly joined in one action and the jurisdictional amount was shown as to each.

(3) Federal jurisdiction was adequately shown.

(4) The bill of complaint states a cause of action.

As respondent views the matter, the gist of the action is the invasion of its property rights and the protection sought against such trespass. Since it is alleged that riparian rights are being invaded by trespasses of a continuing and permanent character, the action to restrain is equitable in nature and the jurisdictional amount should be calculated on the basis of the property right which is being injured. The allegation of the first paragraph of the bill of complaint that the amount in controversy exceeds $3,000 must necessarily relate to the property right in question. The Circuit Court of Appeals has so found and its decision is in accord with the facts of the case and the law as established by this Court.

Defendants were properly joined in one action under both Pennsylvania and Federal practice. The action is equitable in character and asks that money damages be ascertained and assessed against each defendant in proportion to its contribution to plaintiff's injury. When its jurisdiction once attaches, equity may decide every other con-

tention connected with the subject matter of the suit, including the ascertainment and assessment of damages. The Circuit Court of Appeals therefore did not err in regarding the damage allegations as being collateral to the bill's main purpose. The amount in controversy is not determined by any tort liability but by the main purpose of the bill, which is to remove the continuing trespass to plaintiff's property. The allegation that the amount in controversy exceeds the jurisdictional amount applies to the value of the property rights and is necessarily effective against each of the defendants.

The amount of monetary damages which may be recoverable is not the test of jurisdiction. In an action of this kind the invasion of a right, equal in value to the jurisdictional amount, even if otherwise not accompanied by monetary damages, is sufficient to invoke the equitable power of the court and an injunction may clearly issue to prevent future wrong.

Plaintiff has shown special damages, and the cases cited by petitioners on the subject of nuisances and on the law applicable to the mining industry in Pennsylvania do not impair the validity of the complaint nor disclose any error in the opinion of the Circuit Court of Appeals.

In the foregoing respects this brief presents respondent's argument that the decision of the Circuit Court of Appeals is entirely proper under the facts and the law and that no writ of certiorari should be issued.

A.

The Protection of Property Rights Is the Matter in Controversy.

The nature and object of plaintiff's action clearly appears from the bill of complaint. Plaintiff is a lower riparian owner, and the defendants are upper riparian owners. Plaintiff charges the defendants with conducting their mining operations in a negligent manner and with unlawfully discharging quantities of waste materials into

the stream. It is alleged that these waste materials are carried down stream to and upon the premises of the plaintiff, and further that they cause the stream to overflow at and along plaintiff's property. There are also averments of damage to the plaintiff's property and of disruption to its business. The bill avers that defendant's actions constitute a continuing trespass which constantly increases the deposits in the bed of the river and thus threatens to make permanent the injury and damage to the plaintiff; and that, by reason of such improper acts of the defendants, the plaintiff has suffered large and irreparable damages through the permanent depreciation of the value of its property and through the curtailment of the lawful uses to which plaintiff might put the property. An injunction is prayed for, together with other appropriate relief.

The opinion of the Third Circuit Court of Appeals, by McLaughlin, Circuit Judge, aptly sums up the cause of action in a few words—"the hard core of plaintiff's suit is the invasion of its property right and the sought for protection against such trespass." (24)

Plaintiff, as a riparian owner, obviously has a right to have the Schuylkill River reach its property in the stream's natural state, without being polluted by the acts of the defendants. See:

Fricke v. Quinn, 188 Pa. 474, 482 (1898);
Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335, 342 (1862).

In the *Fricke* case Mr. Justice Mitchell said, at page 482:

> "* * * It is the right of the riparian owner to have the natural flow of the stream reach his land in its natural channel, and in its natural condition. An averment that the channel is filled up or diverted, its bed raised so as to obstruct its current, and prevent drainage into it, is an averment of unlawful interference with complainant's rights."

An injunction was awarded in the *Fricke* case, jointly to Christian Fricke and to the Borough of Port Carbon, on findings that the defendants, coal operators, had polluted the water and filled up the channel of Mill Creek (a tributary of the Schuylkill) not by the ordinary exercise of riparian rights, but by excessive and unlawful acts in the mining and washing of coal, to the injury of the complainants as lower riparian owners.

The opinion in the *Holsman* case, supra, states that "Every owner of land, through which a stream of water flows, is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion or pollution."

Plaintiff in the instant case has all the rights of a riparian owner. Manifestly, such rights are not limited to taking water for domestic use, for instance, but are broad enough to include maintenance of a pier and docks and in all other respects to occupy, use and enjoy the property without unlawful interference by the defendants.

Plaintiff's riparian rights are being invaded by trespasses which are alleged to be of a continuing and permanent character. The action to restrain such invasion is equitable in its nature. Under such circumstances, the averment of paragraph 1 of the bill of complaint that the amount in controversy exceeds three thousand dollars, exclusive of interests and costs, necessarily relates to the value of plaintiff's property rights.

Defendants, on the other hand, have never asserted that the value of plaintiff's riparian property rights does not exceed the jurisdictional amount. The basis upon which they challenge the existence of federal jurisdiction will be found in their motion to dismiss the bill of complaint (8a to 10a). Briefly stated, their grounds of objection are: 1. Plaintiff has no standing to abate what defendants say amounts to a public nuisance; 2. if a joint tort is alleged the complaint is not good in law; 3. if separate torts are alleged the complaint fails to aver facts from which the

conclusion can be derived that as to each defendant there is a controversy between it and the complainant which exceeds the jurisdictional amount; 4. there is no showing that between the date plaintiff acquired its property and the date of the filing of the complaint the condition of the Schuylkill River adjacent to plaintiff's property in any wise changed; and 5. the complaint is too general in describing the conduct which it alleges is unlawful.

It is evident that the defendants' approach to the subject of jurisdictional amount has been that it is incumbent upon the plaintiff to establish a money claim for $3,000. damages *in tort* against each defendant. The District Court upheld the defendants' contention in this respect. It regarded the proceeding as being essentially a group of separate tort actions, and looked only for monetary claims against single defendants in excess of the jurisdictional amount. (See 17a.)

The Third Circuit Court of Appeals, in reversing the District Court, adopted the plaintiff's contention that the action is a bill in equity for an injunction, wherein the recovery of monetary damages against any single defendant is merely incidental to the principal matter in controversy, which is the protection of plaintiff's property rights by the removal of continuing trespasses thereto. In its opinion, the Circuit Court of Appeals says on this point: "Protection of that right both now and in the future is prayed for. *That is the controversy the amount of which plaintiff in the first paragraph of the bill of complaint says exceeds $3,000.* Later on plaintiff will have to substantiate that allegation but at this time we are not concerned with the trial proof" (27, 28). (Emphasis supplied.)

Defendants say that the Circuit Court of Appeals was in error in reaching such a conclusion. In the Petition for Writ of Certiorari, under the heading "Reasons Relied Upon for Allowance of Writ", at pages 8 and 9, petitioners characterize as "wholly unwarranted" a statement of the Circuit Court of Appeals distinguishing cases involv-

ing injunctions against public acts. Petitioners assert that "the public interest requires a clarification of this uncertainty, in so far as jurisdictional amount is concerned in injunction cases." We feel confident that such an allegation will not move this Court, in the exercise of sound judicial discretion, to grant a review on Writ of Certiorari.

In their brief before the Circuit Court of Appeals (pp. 4, 5), petitioners stated that "Where injunctive relief is sought, the more recent decisions hold that the test for determining the jurisdictional amount is the damage suffered by the alleged invasion of the right sought to be protected and not the value of the right itself."[1] The Circuit Court of Appeals examined the cases cited by defendants in support of such statement but did not find therein any conflict with the Court's own statement of the rule that "It is well settled that in an action of *this nature,* the jurisdictional amount is to be calculated on the basis of the property right which is being injured." (24) (Emphasis supplied). The Circuit Court of Appeals said that certain recent opinions of this Court do not conflict with the rule stated by the Circuit Court *as applicable to the instant facts,* and then went on to state that "Those decisions indicate that in cases concerning injunctions against public acts, the recent trend of the United States Supreme Court has been to narrow its construction of the jurisdictional amount in controversy." (26, 27.)

Obviously, there are differences between private acts and public acts, and such differences necessarily cut down and qualify the broad proposition sought to be advanced

[1] In support of such statement defendants cited McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936); Kvos, Inc. v. Associated Press, 299 U. S. 269, 56 S. Ct. 197, 81 L. Ed. 183 (1936); Gibbs, Attorney General, et al. v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111 (1939); Allison v. Great Atlantic and Pacific Tea Company (C. C. A. 4th, 1938), 99 F. (2d) 507; Leitch v. City of Chicago et al. (C. C. A. 7th 1930), 41 F. (2d) 728.

by the petitioners. The subject of the amount in controversy in injunction actions is taken up in 1. *Moore's Federal Practice,* where the author handles separately injunctions against private acts (page 530) and injunctions against public acts (page 534). In discussing injunctions against public acts, concerning the amount in controversy in state licensing cases, Moore says, at page 536:

> " * * * a few recent decisions of the Supreme Court clearly indicate the scope of the Court's present and probable future position to be more restricted on amount in controversy in cases concerning injunctions against public acts. The Court's position is explainable on the seemingly politic desire to keep the hands of the federal courts out of the internal affairs of the state as much as possible."

It was well within the province of the Circuit Court of Appeals to distinguish the cases cited by the defendants as not applicable to the instant facts. Moreover, there does not appear to be in *McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178 (1936) any opposition fundamentally to the rule that jurisdiction is to be tested by the value of the object or the right to be protected against interference. In the McNutt case the lawfulness of a state regulation was in question. The object to be protected was the right to be free of such regulation. Apparently a proper way to determine the value of such a right was to measure the loss which would follow the enforcement of the regulation. In the instant case, however, there is involved alleged repeated acts of trespass by private parties, which, if unchecked, will prolong serious interference with the occupancy and enjoyment of plaintiff's rights as a riparian owner. As the Circuit Court of Appeals stated the matter: "In this appeal we are not dealing with the taxing or regulatory authority of a state, but with a continuing trespass by private corporations directly affecting plaintiff's right to occupy and enjoy its property and to function as a business organization." (27)

The decision of the Circuit Court of Appeals in the instant case is entirely warranted, under the facts and the law, and does not create the uncertainty concerning jurisdictional amount in injunction cases which the petitioners allege.

B.

Defendants Were Properly Joined in One Action and the Jurisdictional Amount Was Shown as to Each.

Under Pennsylvania law and equity, upper riparian owners charged with violating the rights of a lower riparian owner may be joined in a single action, and this is particularly so where an injunction is sought against trespasses or nuisances of a continuing and permanent character.

When the District Court dismissed the complaint, it based its conclusion with respect to Pennsylvania law upon the following cases:

Little Schuylkill Navigation, Railroad and Coal Company v. Richard's Administrator, 57 Pa. 142 (1868);
Gallagher v. Kemmerer, 144 Pa. 509 (1891);
Eckman v. Lehigh & Wilkes-Barre Coal Company, 50 Pa. Super. 427 (1912).

These three decisions were written in the light of the practice which ante-dated current concepts and rules relating to the joinder of parties. Also, the three cases deal with attempts to impose a liability against, or to escape liability by, a single coal company for the deposit of culm and refuse by all the coal companies in a particular district, although operating separately and independently of each other. The instant case attempts no such result.

Under modern practice, the instant plaintiff proceeds against various defendants in one action, but asks equitable relief against them, and incidental thereto requests the assessment of the damage caused by each defendant in proportion to its own contribution to the plaintiff's injury. The joinder of the defendants in one action conforms to both

Pennsylvania and federal practice, but in asking damages plaintiff does not seek to impose upon the defendants any liability greater than that recognized by the appellate courts of Pennsylvania.

Plaintiff's case resembles *Gray v. Philadelphia & Reading Coal & Iron Co. et al.*, 286 Pa. 11 (1926). There a bill in equity was filed against several coal companies, alleging that the material deposited by each defendant is not separate and distinguishable, thus making the injury and damage to the plaintiff the single united and combined acts of all the defendants. An injunction was asked against all with an award of appropriate damages against each. Objections were interposed to the bill, and the lower court dismissed the action. On appeal, the Pennsylvania Supreme Court reversed the lower court and reinstated the bill. The opinion by Mr. Justice Simpson states, at page 15:

> " * * * Unlike an action at law, in equity an agreement for a concert of action is not essential to jurisdiction; a single result brought about by the acts of many defendants, even though 'having no connection with each other', is, as the citation shows, sufficient to maintain the jurisdiction, and to defeat the claim of multifariousness . . . "

The said Court further stated, at page 16:

> "* * * Equity is the special forum for obtaining an injunction, which may be granted to prevent actual or threatening trespasses or nuisances of a continuing and permanent character (Kepple v. Lehigh Coal and Navigation Co., 200 Pa. 469; Kramer v. Slattery, 260 Pa. 234; and, when once the jurisdiction has thus attached, equity will itself proceed to round out the whole circle of controversy, by deciding every other contention connected with the subject-matter of the suit, including the amount of damages to which plaintiff is entitled because of injuries theretofore sustained:

Allison & Evans' App., 77 Pa. 221; Walters v. McElroy, 151 Pa. 549; State Hospital for Criminal Insane v. Consolidated Water Supply Co., 267 Pa. 29; Epstein v. Ratosky, 283 Pa. 168."

In the light of the *Gray* decision, there is absolutely no merit in the position asserted by petitioners, at page 18 of their brief, that "The Circuit Court of Appeals was clearly in error in holding that the legal actions for damages were incidental to the equitable relief sought by the plaintiff." Respondent has not seen fit to combine legal actions with an equitable action, as the petitioners contend. It has brought an equitable action only, wherein a court of equity is asked to restrain illegal acts in the future, and in devising its remedy to decide any damages to which plaintiff may be entitled because of the injuries already sustained.

Petitioners are mistaken when they say that the Circuit Court of Appeals refused to hold that the plaintiff was required to show the existence of the jurisdictional amount with respect to each defendant. Since the amount in controversy, which is the value of the property rights being injured, is alleged to be in excess of the jurisdictional amount, the jurisdictional amount is consequently shown with respect to each defendant. Petitioners' confusion on this score results from their persistence in wanting to view the action as a consolidation of separate suits in tort. They say at page 19 of their brief that the plaintiff in its Brief filed with the Circuit Court of Appeals (p. 14) admitted that the averment of jurisdictional amount does not indicate that the plaintiff has a claim for monetary damages in excess of three thousand dollars ($3,000.) against each individual defendant. But the same brief continues to point out (p. 15) that, in any event, it is not such damages that are in controversy, but rather the invasion of plaintiff's rights that is involved; and that, hence, the value of the right to be protected must provide the test of jurisdiction.

The Pennsylvania cases cited by the District Court were adjudicated prior to the adoption of remedial legisla-

tion in Pennsylvania, authorizing the bringing in of additional defendants. Under such legislation the Pennsylvania Supreme Court has held that there is no objection to a plaintiff joining several defendants in one action, whatever the basis of their respective liabilities. See *East Broadtop Transit Company v. Flood*, 326 Pa. 353 (1937).

Subsequent legislation authorized the Pennsylvania Supreme Court to prescribe rules of practice and procedure (1937, June 21, P. L. 1982; 1939, March 30, P. L. 14; 17 P. S. Sec. 61). Pursuant thereto Rule 2229, relating to Permissive Joinder, was adopted, providing:

> "(b) A plaintiff may join as defendants persons against whom he asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action." (Goodrich-Amram Pennsylvania Procedural Rules Service, 2226 to 2250, page 30.)

The federal rule is to the same effect. Rule 20 (a) of the Federal Rules of Civil Procedure, entitled "Permissive Joinder", provides that:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded."

The historical background of the Pennsylvania rule is considered in Goodrich-Amram Procedural Rules Service, Sec. 2299 (b)-1, page 42, where it is observed with respect to prior practice that: "In the field of tort law, if the inde-

pendent and unconcerted acts of several persons harmed the plaintiff, he had to sue them separately unless the doctrine of concurrently negligent tort feasors was applicable.[4] The fact that it may have been difficult to apportion to each tort feasor the harm done by him to the plaintiff did not warrant a departure from this rule.[5] " In the footnote designated "5", the authors cite the *Gallagher* and *Little Schuylkill* cases, supra.

In tracing the course of remedial legislation in Pennsylvania, Goodrich and Amram observe, at page 44:

> "• • • The right of joinder of defendants in trespass actions was extended by the development of the principle that where a tort is committed by one or more persons with the aid or at the direction of others or through the concerted action of several persons;[14] or if the concurrent negligence of several persons produces injury to the plaintiff *all such persons are regarded as jointly and severally liable for the purposes of joinder.*[15] " (Emphasis supplied.)

Under a discussion of the kinds of joinder permitted, Section 2229 (b)-3, page 47, the same authors state:

> "*The owners of upper riparian lands who violate the rights of a lower riparian owner may be joined in a single action.*[10] (Emphasis supplied.)

Footnote "10" relates that the prior practice was to the contrary, citing *Gallagher v. Kemmerer* and *Little Schuylkill Navigation R. & Coal Co. v. Richards,* supra.

An examination of the three Pennsylvania cases cited in the District Courts' opinion will be of assistance in demonstrating that the incidental damages sought in the instant action do not contemplate any greater liability than was applied in such cases.

The *Little Schuylkill* case was an action of trespass on the case. A mill dam had become filled with coal dirt washed downstream from mines belonging to different owners and

operating independently of each other. The effect of a judgment for the plaintiff was to hold one defendant liable for the combined result of all the deposits. The Pennsylvania Supreme Court held that without concert of action no joint suit could be brought against the owners of all the collieries. The difficulty of determining how much dirt came from each colliery was not thought to be a good reason for holding one man liable for the torts of others without concert. But the Court did observe that the *relative proportions* thrown in by each company may form some guide for a jury to measure the injury.

In so far as the *Little Schuylkill* case relates to the joinder of defendants in one action it is no longer the law in Pennsylvania. With respect to the recovery of damages, the instant plaintiff does not seek to hold any one company liable for the torts of the others without concert. The instant plaintiff has alleged a commingling of culm so that "thus the injury and damage to the plaintiff is brought about by the united and combined acts of the defendants" (5a). However, in asking relief, plaintiff prayed that damages "be assessed against each defendant in proportion to his contribution to the plaintiff's injury or damage as determined by this Honorable Court" (7a).

The *Gallagher* case involved a trespass action for the damage caused Gallagher's lands by refuse, culm and dirt washed upon it from the coal mines operated by defendant on land above. The defendant argued that because the plaintiff had already settled with another mine operator for damage to the land there was an accord and satisfaction for the whole damage, since it was impossible to separate and ascertain the proportion of damage caused by each. The Pennsylvania Supreme Court held that this branch of the action was ruled by the *Little Schuylkill* case. There is nothing here at variance with the instant action. In fact, the *Gallagher* case lends support to the assessment of damages against each defendant in proportion to its contribution to the damage.

In the *Eckman* case, a judgment was recovered against the Lehigh & Wilkes-Barre Coal Company for damage caused by the deposit of culm on plaintiff's land. While there was evidence that culm came from defendant's collieries, there was also evidence that it was commingled with culm brought in the same way from other collieries. The appellate court cited among others, the *Little Schuylkill* and *Kemmerer* cases, and the judgment was affirmed.

When the three cases are viewed in the light of the present procedure governing the joinder of parties, it becomes apparent at once that the instant plaintiff's joint action, followed by its prayer for a separate assessment of damages against each defendant, fully harmonizes with Pennsylvania law.

Plaintiff's action does not involve an aggregation of distinct claims against different parties for the purposes of enlarging jurisdiction. The amount in controversy is not determined by any several tort liability; it is determined by the main purpose of the bill, which is to remove a continuing trespass to plaintiff's property.

It is the plaintiff's property rights which are in controversy, and since the amount in controversy is alleged to exceed the jurisdictional amount, the allegation is necessarily effective against each of the defendants. The nature and object of the action and the purposes sought to be accomplished give meaning and content to the jurisdictional allegation.

C.

Federal Jurisdiction Was Adequately Shown.

In asking for a Writ of Certiorari, petitioners say that the Circuit Court of Appeals reinstated the plaintiff's bill of complaint on the strength of a general averment of the jurisdictional amount (p. 9).

It is clear from the bill of complaint that protection of plaintiff's right to occupy and enjoy its property is sought. Protection of that right now and in the future is prayed for.

That is the controversy, and plaintiff specifically pleads in the first paragraph of the bill of complaint that the amount in controversy exceeds $3,000. As respondent has already pointed out, nowhere in defendants' motion to dismiss is there any question raised that the plaintiff's property rights are not worth $3,000. Instead, defendants sought to establish that the plaintiff must show $3,000 in monetary damages against each defendant.

The case of *Clark v. Paul Gray*, 306 U. S. 583 (1939), cited by the petitioners at page 20 of their brief does not sustain their contention. Obviously, a general allegation that the amount involved is in excess of $3,000 will not suffice where *numerous plaintiffs* having no joint or common interest or title in the subject matter of a suit fail to indicate that the claim of any single plaintiff exceeds the jurisdictional amount. The instant action does not involve any such attempted aggregation of claims.

Plaintiff's action in the instant case meets the test prescribed in *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178 (1936), also strongly relied upon by petitioners, because the bill of complaint alleges all the facts essential to show jurisdiction. As the Circuit Court of Appeals points out in its opinion: "It is suggested by the appellees that the plaintiff has not gone into specific details on various phases of the matters complained of and that its averments are too general and do not include ultimate facts. The proposition as presented may be material on a demand for particulars but it does not substantially detract from the fact that *plaintiff has stated a cause of action against the defendants on which it is entitled to its day in Court and to the opportunity of presenting its proof.*" (30) (Emphasis supplied.)

Under no circumstances in an action of this kind should the amount in controversy be tested by the size of the monetary damages recoverable against each coal operator. In *Little Schuylkill Navigation, Railroad and Coal Company v. Richard's Administrator*, 57 Pa. 142, 146 (1868) the court said:

> "* * * The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence."

The instant plaintiff is complaining that the defendants are throwing dirt into the Schuylkill and that their actions in this respect are an invasion of plaintiff's property rights. Is plaintiff deterred from resorting to a federal court to enjoin such trespasses until there are three thousand dollars in monetary damages definitely traceable to each defendant. Surely not! It is not required that a court of equity be able to determine from the bill of complaint the precise monetary damages which plaintiff may be entitled to for past injuries, nor is it necessary that the bill of complaint set forth a mass of data relating to the proof of damages. In an action of this kind the invasion of a right, equal in value to the jurisdictional amount, even if otherwise unaccompanied by monetary damages, is sufficient to invoke the equitable power of the court, and an injunction may clearly issue to prevent future wrong.

Miles Laboratories, Inc. v. Seignious, No. 981, 30 F. Supp. 549 (District Court, E. D. South Carolina) 1939, involved a suit for injunctive relief under a South Carolina statute, known as "The Fair Trade Act." Jurisdiction was questioned on the ground, among others, that there was no showing of damage to the plaintiff, particularly in excess of three thousand dollars. The court said, at pages 554 and 555:

> "(5) It is quite true that the plaintiff makes no attempt by pleading or proof to evalue in money the damage to it by the five sales of Alka-Seltzer made by the defendant, each at a few cents under the so called 'fair trade price.' Nor does the plaintiff contend that these five sales did cause monetary damages to it in excess of three thousand dollars. However, it is a firmly established principle of law that when a litigant seeks an injunction to protect a right, and shows that

some invasion of that right has occurred, or been threatened, the test of the jurisdictional amount is the value of the right that is to be protected, and not the extent of the monetary loss or damage that has been suffered or is threatened by the invasion . . . (7) The position of the defendant, aside from the question of the existence of the jurisdictional amount, that the court is without power to administer the equitable relief of injunction unless some monetary damage to the plaintiff be shown, is entirely unsound. Not only is an invasion of a right, unaccompanied by monetary damage, sufficient to invoke this power of the court of equity, but even a threatened wrong, that has not actually occurred, is sufficient. Swift and Company v. United States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587; State of New York v. State of Illinois, 274 U. S. 488, 47 S. Ct. 661, 71 L. Ed. 1164; Standard Oil Co. of Maine v. Standard Oil Co. of New York, 1 Cir. 45 F. 2d 309, State ex rel. Lyon v. Columbia Water Power, 82 S. C. 181, 63 S. E. 884, 22 L. R. A., N. S., 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343.

"In the first case, supra, Mr. Justice Brandeis, speaking for the court, says (276 U. S. 311, 48 S. Ct. 314, 72 L. Ed. 587): 'The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated.'

(8, 9) "Not only is the absence of monetary damage not a reason for denying injunctive relief, but on the contrary it supports an application for such relief. The fact that there has been no monetary damage accompanying the invasion or threatened invasion of a right, or that the monetary damage is trivial, evidences the inadequacy of a remedy at law, and the inadequacy of a legal remedy is a prerequisite to equitable relief. . . ."

Under all the circumstances of the instant case there was an adequate basis for a court to find that the amount in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs, and that the complaint comes within the jurisdiction of a federal court. The case differs from *Leitch v. City of Chicago et al.* (C. C. A. 7th, 1930) 41 F. (2d) 728 (Certiorari denied 282 U. S. 891, 51 S. Ct. 106, 75 L. Ed. 786 (1930) cited by the defendants. The allegation there was that the *land* was worth many times the jurisdictional amount of $3,000. The Court said:

> "This may well be true, and yet the *value of the riparian rights,* or the damage to the land by reason of filling up the stream, may be very little." (Emphasis supplied.)

In the instant case there is no allegation that the land is worth in excess of $3,000, but there is an allegation that the *amount in controversy* is in excess of $3,000. The subject of the controversy is the protection of plaintiff's riparian rights. Consequently, there is an allegation that the value of the instant plaintiff's riparian rights is in excess of $3,000, a matter which defendants have not yet attempted to deny.

D.

The Bill of Complaint States a Cause of Action.

(1) Special Damage Is Shown.

Petitioners say that in paragraph 14 of the bill of complaint the plaintiff describes their activities as amounting to a nuisance. Such a nuisance, petitioners continue, would be a public one, involving impairment of the navigability of the stream, and respondent has standing to enjoin such a public nuisance only if it can show that it has suffered injury therefrom different in kind and degree from that suffered by other riparian owners and members of the general public coming into contact with the nuisance.

The rights of the general public in the navigability of the Schuylkill River are important, surely, but the respondent's immediate concern is the protection of its own riparian rights against *continuing trespasses.* The Circuit Court of Appeals correctly answered defendants' objection when it stated:

> "In the situation before us the plaintiff is a lower Schuylkill River riparian owner who charges a continuing trespass to and upon its property resulting in irreparable injury to the property and to its business. In so doing the plaintiff is directly asserting some extraordinary damage beyond that incurred by the general public and we think, comes within the scope of the Knowles opinion." (30)

The opinion of the Circuit Court of Appeals quotes at length from *Knowles v. Pennsylvania Railroad Co.,* 175 Pa. 623. In the interest of brevity the quotation will not be duplicated here. It is sufficient to observe that the case fully warrants and supports the view of the Circuit Court of Appeals on the Pennsylvania law applicable to this phase of the case.

Respondent's rights as a riparian owner rise higher than the rights of the general public in the stream. See, for example, *Philadelphia v. Philadelphia Suburban Water Co.,* 309 Pa. 130 (1932), where Mr. Justice Drew states, at page 150:

> "The Schuylkill is a navigable river, and in its waters the interests of navigation are second only to the paramount right of riparian owners to take water for domestic use: Phila. v. Collins, supra; Phila. v. Gilmartin, supra; Hunt v. Graham, 15 Pa. Superior Ct. 42. . . ."

Petitioners cite *The Buck Mountain Coal Company v. The Lehigh Coal and Navigation Company,* 50 Pa. 91 (1865), as an instance where a private party was held to

have no standing to abate a public nuisance. However, in that case an Act of Incorporation of 1822 imposed the duty on defendant to keep and maintain the slack water system in order and repair. A failure to perform that duty was a failure to perform a duty owing to the public. The plaintiff there did not establish a failure of a duty towards itself. The instant case is not at all analogous. Here the defendants have a duty not to injure the plaintiff as a lower riparian owner.

Gold v. The City of Philadelphia, 115 Pa. 184 (1886), also relied upon by petitioners, involved a municipal corporation. In the decision of the case, it is stated, at page 198:

> "When a duty is imposed upon a municipal corporation for the benefit of the public, no consideration or benefit is received by such municipality, as in the case of a trading corporation, hence no implication arises of liability to the individual citizen for any injury he has suffered in common with other citizens resulting from a neglect of such duty. To sustain a contrary doctrine would be disastrous to municipalities, and consequently to the general public. If we once throw open the door to a recovery in such cases, how are we to measure the extent to which a public highway may be out of repair to entitle owners of property abutting thereon to recover damages?"

No such public considerations are involved in the instant action.

At pages 28 and 29 of their brief, petitioners quote from *Rhymer v. Fretz,* 206 Pa. 230 (1903), where a plaintiff was held to have no standing to enjoin the construction of a building. The Court said at page 233:

> ". . . His only complaint is that the erection of the building and the uses to which it will be put 'will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with

the unlawful gathering of persons in the neighborhood, will deprive himself and his neighbors of the full enjoyment and proper use of their property and home.' . . ."

This quotation immediately precedes the portion of the *Rhymer* decision quoted by the petitioners, and thoroughly explains the court's further remarks (quoted by petitioners) that in such averment there is no showing of special damage to the plaintiff. In the instant case, on the other hand, the plaintiff charges a continuing trespass to and upon its property, resulting in irreparable injury to the property and to plaintiff's business. As the Circuit Court of Appeals has found, the instant plaintiff has directly asserted some extraordinary damage beyond that incurred by the general public.

2. Unlawful Mining Is Alleged.

Petitioners charge that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable Pennsylvania decisions relating to the mining industry (p. 9 of petition). In developing the point in their brief petitioners draw heavily upon *The Pennsylvania Coal Company v. Sanderson,* 113 Pa. 126, 6 Atl. 453 (1886), saying that the Supreme Court of Pennsylvania has therein "limited the application of the maxim, *sic utere tuo et alienum non laedos,* which is generally observed, in favor of the proposition that harm caused to one land owner by another as the necessary and unavoidable result of a natural use of his land by the latter, without negligence or malice, is *damnum absque injuria.*" (p. 30)

The Supreme Court of Pennsylvania has several times found it necessary to comment upon the *Sanderson* case, and to limit its application. *Robertson v. Coal Co.,* 172 Pa. 566 (1896), was an action of trespass to recover damages for subsidence of surface caused by alleged negligent mining. Mr. Justice Williams stated, at page 572:

". . . For myself I would permit no general rule of this sort to work confiscation in either case, but leave to a court of equity the adjustment of the terms and conditions on which each could use his own so as to inflict the least practicable injury on the other. This court however, is not disposed at present to modify the rule of Sanderson's case as it is stated above. That rule has no application to this case."

Sullivan v. Jones & Laughlin Steel Company, 208 Pa. 540 (1904), involved a bill in equity for an injunction against the escape of dust from blast furnaces. The opinion by Mr. Justice Brown states at page 549:

"The changed conditions brought about by the appellee have not resulted from the development and natural use and enjoyment of its own property, as was the situation in *Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, the doctrine of which case has never been and never ought to be extended beyond the limitations put upon it by own own facts. . . .*" (Emphasis supplied.)

See, also, *Pennsylvania R. R. et al. v. Sagamore Coal Co., et al.,* 281 Pa. 233 (1924), where Mr. Justice Schaffer states (pp. 248, 249):

"We now come to the consideration of the conclusion of the trial judge that the right to drain the mine water into the stream is a property right. To reach this determination, he gave to the Sanderson case a much broader effect than it has ever before been given and overlooked how limited has been its application. It is somewhat difficult to understand why he badged the draining of the mine water into the stream as a 'property right' in the defendants, of which they cannot be deprived except upon payment being made to them. Nothing said in the Sanderson opinion warrants such conclusion even from the standpoint of the

private right involved and certainly not where public rights are at stake. No such term as a right of property was applied in that decision to the act of the mine owner in polluting the stream. He was taken out of the rule that his act was one of nuisance, by the exceptional situation there existing, and it was expressly stated that the privilege accorded to him would not be sanctioned where the public is concerned. . . ."

In *Venzel v. Valley Camp Coal Co.*, 304 Pa. 583 (1931) Mr. Justice Kephart says, at page 589:

"Where dangerous gases accumulate on a property from its lawful use in mining coal, and where it is reasonably forseeable that such gas may escape and injure persons on adjoining property, there is an affirmative duty on the owner to prevent, if possible, the escape of such gases to his neighbor's property. We have so held with regard to water coming from mines which drains into streams used as public drinking supplies: P. R. R. Co. v. Sagamore Coal Co., 281 Pa. 233. *To that extent, the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, and all other Sanderson Cases treating the subject, have been overruled.*" (Emphasis supplied.)

Thus, it is evident that in some respects the *Sanderson* case has been overruled, while in other respects it has been qualified. In any event, it is practically limited to its own facts. In *Harvey v. Susquehanna Coal Company,* 201 Pa. 63 (1902)—a case cited by petitioners—there was an action in trespass for injuries to real estate caused by the alleged negligent escape of coal duct from a breaker. The opinion by Mr. Justice Brown takes up the contention of the appellant that the injury is damnum absque injuria under the *Sanderson* case and points out (pp. 66, 67):

". . . This same case was held to be 'not at all in point in Hindson v. Markle, 171 Pa. 138, where it was

decided that the owner of coal mines may deposit refuse and culm upon his own land, and if the same are carried away by extraordinary floods into a stream which runs through the land of a lower owner, spreading thence over such lower land, the owner of the coal land is not responsible in damages to the lower owner for the injury thus sustained; but, if the refuse is placed on his own land, in a position where it is washed into the stream by ordinary storms, or if he deposits his refuse and culm directly in the stream, and damage thereby results to the lower owner the mine owner or operator is liable for the damage and injury thus occasioned to the lower owner. Referring to the Sanderson case and its inapplicability, the late Chief Justice Green said: 'That was the mere flowage of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it caused no deposit of any foreign substance on the land of the plaintiff and did not deprive her of its use. . . .'"

Also in *Elder v. Lykens Valley Coal Co.*, 157 Pa. 490 (1893)—another case cited by petitioners—the opinion by Mr. Justice Williams states, at page 497:

". . . But he must deposit the culm and refuse on his own lands. He has no right to throw it into the streams, or leave it where ordinary floods will carry it down upon the lands of others; Lentz v. Carnegie Bros., 145 Pa. 612. If he does throw it into the stream, or leave it where ordinary floods will carry it away, then the injury that his neighbor may suffer therefrom is not the natural and necessary consequence of the rightful mining of coal, but of the want of proper care in disposing of the refuse product of the mines. For an injury resulting from the want of care, an action will lie. It may be convenient or economical for the

coal owner to throw the refuse of his mines into the streams, but that is not enough. He is bound to consider the rights of others. If he takes the risk of injuring others to save trouble or expense for himself, he makes himself liable for the loss his conduct may inflict on his neighbors. These general rules are settled by a multitude of cases."

In the instant case the injuries complained of are not the result of the natural and necessary mining of coal, but of the want of proper care in disposing of the refuse products of the mines. The complaint charges the defendants with wilfully, negligently, recklessly, wantonly and unlawfully discharging water heavily burdened and polluted with coal dirt, fine coal, culm, refuse, materials and silt wastes, into the stream (par. 7—4a). It charges the defendants with depositing in the Schuylkill or its tributaries and upon the banks thereof large quantities of coal dirt, fine coal, culm, refuse materials and silt wastes which come from their mines, collieries, coal washeries and coal preparation plants (par. 8—4a). It is charged that defendants have negligently failed to secure their culm piles against erosion and that as a result the stream has been heavily charged and polluted (par. 9—4a, 5a). It is charged that the coal wastes are carried to and upon the premises of the plaintiff (par. 10—5a) and that they have raised the bed of the river and narrowed its channel, so that through rains and otherwise, the river overflows its banks at and along plaintiff's property (par. 12—5a).

It is clear that the defendants have been charged with unlawful and negligent acts in the conduct of their mining operations. Consequently, the Circuit Court of Appeals in reinstating the complaint has not, as petitioners allege, decided an important question of local law in a way probably in conflict with applicable Pennsylvania decisions relating to the mining industry, but has rendered its decision in accordance with the principles of law and equity properly applicable to the instant case.

CONCLUSION.

In summation, respondent submits that the averments of the bill of complaint constituted an entirely adequate statement and showing of all the grounds on which federal jurisdiction depends, and of a claim wherein the plaintiff is entitled to its day in court and an opportunity to go forward with its proof.

The action of the Circuit Court of Appeals in so construing the complaint, and in giving to its averments force and effect, is altogether reasonable and is fully warranted under the facts of the law.

Petitioners have not demonstrated any incompatibility, such as they allege exists, between the decision of the Circuit Court of Appeals and other decisions of this Court and of the Supreme Court of Pennsylvania. The decision of the Circuit Court of Appeals is well reasoned and carries ample supporting citations of authority. The determination of the Circuit Court of Appeals with respect to the amount in controversy fully harmonizes with the applicable decisions of this Court, and its action in reinstating the complaint is in nowise at variance with the decisions of the Supreme Court of Pennsylvania.

Consequently, respondent respectfully submits that petitioners have not established such special and important reasons as to indicate any case for the interposition of this Court by certiorari.

Respectfully submitted,

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